In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-257

LOUIS HENRY COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted on three counts of an indictment charging an illegal sale of heroin in violation of 21 U.S.C. 174 and 26 U.S.C. 4705(a) (Tr. 4–5, 35).[1] On November 3, 1969, he was sentenced to imprisonment for five years on each count, the sentences to run concurrently. (Tr. 38, 40.) The court of appeals affirmed the conviction on February 19, 1971 (Pet. App.) and a petition for rehearing was denied on March 16, 1971. The petition for a writ of certiorari, filed on June 8, 1971, is out of time under Rule 22(2) of the Rules of

[1] "Tr." refers to the transcript of the trial testimony, a copy of which we are lodging with the Clerk of this Court.

this Court.[2] In any event, the petition presents no issue warranting review by this Court.

Federal narcotics agent Taylor, the sole prosecution witness, testified that on May 1, 1969, he went to an apartment in Los Angeles where he met petitioner. Taylor told petitioner that he was looking for Herbert or Willie Cox (petitioner's brothers) in order to purchase some heroin. Petitioner said that they were not there, but that he perhaps could take care of Taylor, if he would get in touch with him on the following day (Tr. 7–8). On May 2, 1969, Taylor telephoned the apartment and asked to speak to Louis. Petitioner, who answered the phone, identified himself as Louis. Taylor said he was ready to purchase one-half ounce of heroin. Petitioner said that the heroin would be ready upon Taylor's arrival at the apartment, and that, in addition, he had a very good grade of cocaine he would like to sell for $725 per ounce (Tr. 8). When Taylor arrived at the front door, he was met by petitioner and Herbert Cox, who instructed Taylor to go inside and be seated. A few minutes later, petitioner came into the room and handed Taylor an aluminum foil container containing heroin, for which Taylor paid petitioner $175 (Tr. 9–10, 16–17).

Petitioner testified that he had not sold heroin to Taylor on May 2 or at any other time (Tr. 19, 20) and that Taylor must have mistaken him for one of his brothers (Tr. 28): Recalled as a rebuttal witness, Taylor testified that he was sure his May 2nd purchase of narcotics was from petitioner, since he knew both

[2] Petitioner's counsel has filed an affidavit in this Court containing a motion for relief from default.

Herbert and Willie and it was not either one of them (Tr. 31). In accepting Taylor's testimony as credible, the trial court stated, "* * * I have grave doubt that Mr. Taylor would confuse Herbert and the defendant, particularly since Herbert was there at the very time that the narcotics was purchased, and he also knows Willie, and he was convinced it wasn't Willie" (Tr. 34).

Petitioner now contends that he was denied the effective assistance of counsel in that his trial counsel also represented petitioner's brother, Herbert Cox, in another narcotics case and, because of this alleged conflict of interest, failed to call Herbert as a defense witness on the issue of identification. There is nothing in the record, however, to indicate that Herbert Cox would have testified that he, rather than petitioner, sold the heroin to Taylor. On cross-examination of Taylor, petitioner's counsel had elicited the fact that petitioner and Herbert looked alike and that Herbert was then in the courtroom (Tr. 12–13). Counsel could well have decided, as a matter of trial strategy, that it would have served no useful purpose to call Herbert thereafter as a witness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971